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No. 93-712

In the Supreme Court of the United States

OCTOBER TERM, 1993

RAFAEL SANCHEZ AND LUIS SANCHEZ, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the doctrine of collateral estoppel barred petitioners' trial on federal charges in the Southern District of Florida stemming from their participation in an attempted murder for hire, after they were acquitted in Puerto Rico Superior Court of various offenses also stemming from the attempted murder.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	7
Conclusion	15

TABLE OF AUTHORITIES

Cases:

Abbate v. *United States*, 359 U.S. 187 (1959)	12
Ashe v. *Swenson*, 397 U.S. 436 (1970)	7
Barktus v. *Illinois*, 359 U.S. 121 (1959)	12, 14
Blockburger v. *United States*, 284 U.S. 299 (1932)	6
Brown v. *Ohio*, 432 U.S. 161 (1977)	7
Cordova & Simonpietri Ins. Agency Inc. v. *Chase Manhattan Bank*, 649 F.2d 36 (1st Cir. 1981)	13
Davis v. *Eide*, 439 F.2d 1077 (9th Cir.), cert. denied, 404 U.S. 843 (1971)	15
Dowling v. *United States*, 493 U.S. 342 (1990)	7, 8
Examining Board of Engineers, Architects & Surveyors v. *Flores de Otero*, 426 U.S. 572 (1976)	13
Grady v. *Corbin*, 459 U.S. 508 (1990)	6
Grafton v. *United States*, 206 U.S. 333 (1907)	12
Heath v. *Alabama*, 474 U.S. 82 (1985)	12
Montana v. *United States*, 440 U.S. 147 (1979)	10
Puerto Rico v. *Shell Co.*, 302 U.S. 253 (1937)	12
Rodriguez v. *Popular Democratic Party*, 457 U.S. 1 (1982)	13
Sunshine Anthracite Coal Co. v. *Adkins*, 310 U.S. 381 (1940)	10
United States v. *Benmuhar*, 658 F.2d 14 (1st Cir. 1981)	13
United States v. *Bennett*, 836 F.2d 1314 (11th Cir.), cert. denied, 487 U.S. 1205 (1988)	7, 8

Cases—Continued: Page

United States v. *Bonilla Romero*, 836 F.2d 39 (1st Cir.), cert. denied, 488 U.S. 817 (1987) 10, 11, 13, 14-15
United States v. *Dixon*, 113 S. Ct. 2849 (1993) 6
United States v. *Gentile*, 816 F.2d 1157 (7th Cir. 1987) .. 8
United States v. *Head*, 697 F.2d 1200 (4th Cir. 1982), cert. denied, 462 U.S. 1132 (1983) 7
United States v. *Lanza*, 260 U.S. 377 (1992) 12
United States v. *Lopez Andino*, 831 F.2d 1164 (1st Cir. 1987), cert. denied, 486 U.S. 1034 (1988) 13
United States v. *Morales-Diaz*, 925 F.2d 535 (1st Cir. 1991) 13
United States v. *Payne*, 2 F.3d 706 (6th Cir. 1993) 15
United States v. *Perchitti*, 955 F.2d 674 (11th Cir. 1992) 10
United States v. *Quinones*, 758 F.2d 40 (1st Cir. 1985) .. 13
United States v. *Ragins*, 840 F.2d 1184 (4th Cir. 1988) . 7, 8

Constitution, statutes and rule:

U.S. Const.:
Amend. V (Double Jeopardy Clause) 5, 7, 12
Amend. VI 6
Puerto Rican Federal Relations Act, Pub. L. No. 600, 64 Stat. 319 (1950) (48 U.S.C. 731e) 5, 12
18 U.S.C. 842(a)(3) 2
18 U.S.C. 842(i)(1) 2
18 U.S.C. 844(d) 2
18 U.S.C. 1074 2
18 U.S.C. 1958 2
28 U.S.C. 41 12
28 U.S.C. 1294(1) 12
Fed. R. Evid. 404(b) 6

Miscellaneous:

1B J. Moore, J. Lucas & T. Currier, *Moore's Federal Practice* (2d ed. 1993) 10
Restatement (Second) of Judgments (1982) 10

Miscellaneous—Continued: Page

18 C. Wright, A. Miller, & E. Cooper, *Federal Practice and Procedure*, (1981) 10

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OPINIONS BELOW

The opinion of the court of appeals, as amended (Pet. App. 46-50), is reported at 3 F.3d 366. The earlier opinion (Pet. App. 1-45) is reported at 992 F.2d 1143. The opinion of the district court is reported at 741 F. Supp. 215.

JURISDICTION

The judgment of the court of appeals was entered on September 30, 1993. The petition for a writ of certiorari was filed on November 2, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Southern District of Florida, petitioners were convicted of causing travel in interstate commerce with intent that a murder be committed for a pecuniary consideration, in violation of 18 U.S.C. 1958; the unlicensed transportation of plastic explosives in interstate commerce, in violation of 18 U.S.C. 842(a)(3); the transportation of an explosive in interstate commerce with intent to kill, in violation of 18 U.S.C. 844(d); and unlawful flight to avoid prosecution, in violation of 18 U.S.C. 1074. In addition, petitioner Rafael Sanchez was convicted of causing an explosive to be transported in interstate commerce while he was under indictment, in violation of 18 U.S.C. 842(i)(1). Petitioners were both sentenced to life imprisonment, and petitioner Rafael Sanchez was also fined $75,000. The court of appeals affirmed.

1. In January 1988, petitioners resided in Key Largo, Florida, where Rafael owned a marina and fishing boats and ostensibly ran a lobster fishing operation. The boats, however, were primarily used to further petitioners' marijuana and cocaine smuggling activities. Brian Williams worked for Rafael as a debt collector and bodyguard; Nelson Seda was married to Rafael's step-daughter and was one of Rafael's drug customers. Pet. App. 4.

In late August or early September, Seda went to Rafael's home and stole a wooden chest containing three kilograms of cocaine. Seda and a friend consumed some of the cocaine and sold the rest for $25,000. Rafael suspected Seda of the theft. Pet. App. 5.

In 1986, Seda moved to Puerto Rico and dropped out of contact with petitioners. In May 1988, while visiting Puerto Rico, Rafael spotted Seda by chance. When Rafael returned to Florida, he told bodyguard Williams that he wanted Seda killed. Williams enlisted Antonio Gonzalez, an employee at Rafael's marina, to assist him in assassinating Seda. Rafael explained to Williams and Gonzalez that he wanted Seda killed because of the cocaine theft. He gave them a bag containing $5,000 and indicated that they would receive additional payment after successful completion of the job. Pet. App. 5.

Gonzalez and Williams then went to the residence of Luis Sanchez and informed him that they had agreed to kill Seda. Luis gave them a small electronic device that he described as a radio-detonated, remote controlled bomb. Luis took the device apart and demonstrated the operation of the arming switch. Luis instructed Gonzalez and Williams to place the device under the seat or the gas tank of Seda's car. Pet. App. 5-6.

On June 11, 1988, Gonzalez and Williams flew to San Juan, concealing the bomb in a bag containing diving equipment, which they checked for storage in the airplane baggage compartment. On June 19, Williams and Gonzalez located Seda in Mayaguez. They then drove to the street where Seda lived. They parked nearby and waited for an opportunity to plant the bomb. As he waited, Williams toggled the unlabeled arming switch on the explosive device, trying to remember which position primed it for detonation. That action caused the bomb to explode, killing Williams and injuring Gonzalez. Following his release from the hospital, Gonzalez was arrested. Soon

thereafter he began cooperating with the Puerto Rico police and the FBI. Pet. App. 6.

Shortly after the bombing accident, Luis Sanchez went to the duplex he had shared with Williams and removed a bomb, a silenced pistol, and some gold jewelry. In mid-July 1988, petitioners moved to Charleston, South Carolina. On September 29, 1988, acting on information that cocaine was being kept at petitioners' residence, local police searched the premises and arrested petitioners for possession of cocaine. Pet. App. 6-7.

Shortly thereafter, the FBI advised South Carolina authorities that fugitive warrants had been issued for petitioners by the Commonwealth of Puerto Rico, based on violations of Puerto Rico law stemming from the bombing incident in Mayaguez. The South Carolina charges were dropped and petitioners were transferred to Puerto Rican custody, where they were charged with the first degree murder of Williams, the attempted murder of Seda, conspiracy to murder Seda, destruction, unlawful use of explosives, and unlawful possession of explosives. Following a trial in Puerto Rico Superior Court (which federal investigators unsuccessfully attempted to delay pending the completion of their own investigation), petitioners were acquitted of all the charges against them. Pet. App. 7-10, 30.

2. Petitioners were thereafter indicted in the Southern District of Florida on federal charges of murder for hire, unlicensed transport of explosives, transport of explosives with intent to injure or kill, and flight to avoid prosecution. In addition, Rafael was charged with the transportation of explosives by an indicted felon. Petitioners moved to dismiss the

indictment, claiming that their prosecution on the federal charges violated the Double Jeopardy Clause as well as principles of collateral estoppel. The district court rejected those claims. The court found that the Commonwealth of Puerto Rico and the federal government were separate sovereigns for double jeopardy purposes, and that successive prosecution of petitioners for the same unlawful act therefore did not violate the Double Jeopardy Clause. 741 F. Supp. at 218-219. The court further held that because Puerto Rico and the United States were separate sovereigns, the United States could not be considered a party to the Puerto Rico prosecution. Accordingly, the court held that the doctrine of collateral estoppel did not apply. *Id.* at 219. Petitioners proceeded to trial and were convicted on all counts.

3. The court of appeals initially reversed petitioners' convictions on the murder for hire count and affirmed on all other counts. Pet. App. 1-45. The court disagreed with the district court's conclusion that Puerto Rico and the United States constituted separate sovereigns for purposes of the Double Jeopardy Clause. Pet. App. 11-22. In the court's view, Puerto Rico's judicial tribunals exert all of their powers by authority of the United States, and Puerto Rico should thus be treated as a territory of the United States, rather than a separate sovereign, for double jeopardy purposes. The court rejected the notion that the passage of the Federal Relations Act in 1950, granting the right of self-governance to the people of Puerto Rico pursuant to a constitution of their own adoption, had so altered the relationship between Puerto Rico and the United States that

Puerto Rico had become sovereign for purposes of the dual sovereignty doctrine. Pet. App. 18-22. Turning to the question whether the federal offenses of which petitioners were convicted constituted the same offenses as those of which they had been acquitted in Puerto Rico, the court applied this Court's decision in *Grady* v. *Corbin*, 495 U.S. 508 (1990), and concluded that only the murder for hire charge was barred. Pet. App. 22-39.*

Petitioners petitioned for rehearing, arguing that *Grady* barred most of the other counts on which they had been convicted. On June 28, 1993, after this Court overruled *Grady* in *United States* v. *Dixon*, 113 S. Ct. 2849 (1993), the court of appeals denied petitioners' petition for rehearing and *sua sponte* withdrew the portion of its initial opinion holding that petitioners' murder for hire convictions should be reversed. Applying the rule announced in *Blockburger* v. *United States*, 284 U.S. 299 (1932), the court concluded that the federal charge of murder for hire and the Puerto Rico charge of attempted murder constituted separate offenses. Pet. App. 47-50. Accordingly,

* The court rejected numerous other challenges to petitioners' convictions, including claims that inculpatory statements made by petitioners had been elicited in violation of their Sixth Amendment right to counsel; that the district court had erred in admitting evidence of similar bad acts pursuant to Fed. R. Evid. 404(b); that the government had failed to provide them prior to trial with exculpatory evidence; that the district court had improperly allowed the admission of inflammatory evidence; that petitioners should have been permitted to introduce evidence of their acquittal in Puerto Rico Superior Court; that the evidence was insufficient to support their convictions; and that the district court had improperly applied the Sentencing Guidelines. Pet. App. 39-45.

the court affirmed petitioners' convictions on the murder for hire count. Pet. App. 50. The court did not address petitioners' collateral estoppel argument in either its original or amended opinion.

ARGUMENT

Petitioners argue (Pet. 4-13) that their acquittals in Puerto Rico Superior Court on various charges stemming from the attempted murder of Seda collaterally estopped the federal government from bringing federal charges based upon the same attempted murder.

1. As the Court has made clear, the Double Jeopardy Clause incorporates the doctrine of collateral estoppel. *Ashe* v. *Swenson*, 397 U.S. 436, 445-446 (1970). See also *Dowling* v. *United States*, 493 U.S. 342, 347 (1990). Collateral estoppel serves to bar a second criminal prosecution where that prosecution requires the relitigation of factual issues already resolved by a prior criminal prosecution. *Brown* v. *Ohio*, 432 U.S. 161, 166 n.6 (1977); *Ashe* v. *Swenson*, 397 U.S. at 443-445. "If the fact necessarily determined in the first trial is an essential element of the second offense, collateral estoppel may operate as a complete bar against the subsequent prosecution, affording the defendant 'double jeopardy' protection, even when that prosecution is not for the 'same offense' as the first." *United States* v. *Ragins*, 840 F.2d 1184, 1193-1194 (4th Cir. 1988). See also *United States* v. *Bennett*, 836 F.2d 1314, 1316 (11th Cir.), cert. denied, 487 U.S. 1205 (1988); *United States* v. *Head*, 697 F.2d 1200, 1205 (4th Cir. 1982), cert. denied, 462 U.S. 1132 (1983).

In assessing a claim of collateral estoppel, *Ashe* requires a court "to 'examine the record of a prior proceeding, taking into account the pleadings, evidence, charge, and other relevant matter, and conclude whether a rational jury could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration.'" 397 U.S. at 444. The defendant, however, bears the burden of identifying the factual issues necessarily decided at the first trial that would preclude his retrial on the remaining charges. *Dowling* v. *United States*, 493 U.S. at 350; *United States* v. *Ragins*, 840 F.2d at 1194; *United States* v. *Bennett*, 836 F.2d at 1317 n.1; *United States* v. *Gentile*, 816 F.2d 1157, 1162 (7th Cir. 1987).

2. The court of appeals did not expressly address petitioners' collateral estoppel claims. The court's silence may have been the result of a determination that petitioners failed to carry their burden of establishing that the Puerto Rico jury necessarily decided in their favor any factor necessary to their convictions on the federal offenses. Indeed, that burden was particularly significant in this case, since the various federal charges brought against petitioners required proof of a variety of different facts. Thus, depending on the findings made by the Puerto Rico jury, the acquittals in Puerto Rico could have decided issues of fact relevant to none, some, or all of the federal charges.

In the district court, petitioners summarily asserted that the Puerto Rico jury necessarily determined that they were not the individuals who had hired the assassins to bring explosives to Puerto Rico with the intent to kill Seda. But petitioners

failed to refer to anything in the pleadings or evidence at the Puerto Rico trial to substantiate their claim. Indeed, petitioners even failed to provide the district court with a copy of the transcript of the Puerto Rico proceedings to support their claim of collateral estoppel. It was not until the case was on appeal that petitioners moved to supplement the record to include the transcript of the Puerto Rico trial.

Even on appeal petitioners failed to make the necessary factual case to support their claim of collateral estoppel. As in the district court, they simply repeated their conclusory allegations that the Puerto Rico jury must have determined that they were not the individuals who had hired assassins to kill Seda. See Pet. C.A. Br. 34 ("the prior jury necessarily determined, by their acquittal of [the] charges, that [petitioners] did not procure Gonzalez and Williams to murder Nelson Seda by sending a bomb through interstate commerce to be used by Gonzalez and Williams to kill Seda").

Moreover, when the court of appeals affirmed petitioners' convictions on all counts but the murder for hire count, on the ground that the offenses constituted separate offenses for double jeopardy purposes, petitioners' rehearing petition did not protest the court's failure to address their collateral estoppel claim. Rather, petitioners sought relief from the court's decision solely on the basis that the convictions affirmed by the court of appeals should be reversed under a proper *Grady* analysis.

In their petition for certiorari, petitioners do no more than repeat their conclusory allegations as to what the Puerto Rico jury necessarily must have found. Petitioners therefore have failed at every

juncture to lay the proper foundation for a claim of collateral estoppel, and they are accordingly not entitled to relief on that issue.

3. Even if petitioners had established that the Puerto Rico jury necessarily found in their favor on an issue of fact essential to conviction on some or all of the charges brought against them in the present prosecution, they would still not be entitled to relief. One of the requirements of the doctrine of collateral estoppel is that the party to be precluded from relitigating an issue decided in a previous litigation was either a party or in privity with a party to that prior litigation. *Montana* v. *United States*, 440 U.S. 147, 153-154 (1979); *United States* v. *Perchitti*, 955 F.2d 674, 676 (11th Cir. 1992); *United States* v. *Bonilla Romero*, 836 F.2d 39, 43 (1st Cir.), cert. denied, 488 U.S. 817 (1987); Restatement (Second) of Judgments §§ 27, 39, 41 (1982); 1B J. Moore, J. Lucas & T. Currier, *Moore's Federal Practice* ¶¶ 0.441[3], 0.443[1] (2d ed. 1993); 18 C. Wright, A. Miller, & E. Cooper, *Federal Practice and Procedure*, § 4448 (1981). "The party estopped due to representation by a party to the action must have been 'so closely related to the interest of the party to be fairly considered to have had his day in court.'" *United States* v. *Bonilla Romero*, 836 F.2d at 43; *United States* v. *Perchitti*, 955 F.2d at 676 (same). See also *Sunshine Anthracite Coal Co.* v. *Adkins*, 310 U.S. 381, 402-403 (1940) ("The crucial point [for determining privity between federal agencies] is whether or not in the earlier litigation the representative of the United States had authority to represent its interests in a final adjudication of the issue in controversy.").

Here, the federal government was neither a party, nor in privity with a party, to the trial in the Puerto Rico Superior Court. Federal prosecutors have no authority to bring prosecutions in the Puerto Rico courts, which were established by the Puerto Rico constitution, see Pet. App. 12 n.3, or to control in any way the course of proceedings in those courts. Indeed, that fact is demonstrated in this case by the inability of the federal authorities to delay the Puerto Rico proceedings until the federal investigation was completed. See Pet. App. 30. Moreover, the interest of the United States in prosecuting petitioners on the federal charges was not vindicated by the Puerto Rico proceedings, because the Puerto Rico authorities did not have the power to prosecute petitioners for their violation of the federal laws.

In short, the separate interests of the United States in prosecuting petitioners were not so closely related to those of Puerto Rico that the United States can be fairly considered to have had its day in court. As the court explained in *United States* v. *Bonilla Romero*, 836 F.2d at 44, in concluding that Puerto Rico and federal law enforcement officials were not in privity during a local pretrial suppression hearing, there is "no reason why the principles of fairness, justice, and judicial economy embodied in the doctrine of collateral estoppel require that this doctrine be expanded to bind a party so remote from the action decided." When, as in this case, the two prosecutions were brought by different prosecuting entities, neither of which had any authority or control over the other, and involved violations of the criminal statutes of separate legal systems, it is

appropriate to deny collateral estoppel effect to the earlier proceedings.

4. We acknowledge that the First and Eleventh Circuits disagree about the application of the dual sovereignty doctrine to successive prosecutions by Puerto Rico and the United States. This Court has held that the Double Jeopardy Clause does not prohibit one sovereign, such as the federal government, from prosecuting a defendant for particular conduct, even if that conduct has previously been the subject of prosecution by another sovereign, such as a State. *Abbate* v. *United States*, 359 U.S. 187, 194 (1959); *Bartkus* v. *Illinois*, 359 U.S. 121, 132 (1959); *United States* v. *Lanza*, 260 U.S. 377 (1922). The dual sovereignty doctrine rests on the premise that a person who has violated the "peace and dignity" of two sovereigns has committed two distinct offenses. *Heath* v. *Alabama*, 474 U.S. 82, 88 (1985).

In this case, the Eleventh Circuit concluded that Puerto Rico and the United States are not separate sovereigns, relying on this Court's decision in *Puerto Rico* v. *Shell Co.*, 302 U.S. 253, 264 (1937). See also *Grafton* v. *United States*, 206 U.S. 333 (1907) (the Philippine Islands). In the court's view, "[t]he authority with which Puerto Rico brings charges as a prosecuting entity derives from the United States as sovereign." Pet. App. 19.

The First Circuit, which has jurisdiction over appeals from the United States District Court for the District of Puerto Rico, see 28 U.S.C. 41, 1294(1), has taken the contrary view. After this Court's decision in *Shell*, Congress enacted the Puerto Rican Federal Relations Act, Pub. L. No. 600, 64 Stat. 319 (1950) (codified at 48 U.S.C. 731e), which changed the status

of Puerto Rico from territory to commonwealth. See *Examining Board of Engineers, Architects & Surveyors* v. *Flores de Otero*, 426 U.S. 572, 593-596 (1976); *Cordova & Simonpietri Ins. Agency Inc.* v. *Chase Manhattan Bank*, 649 F.2d 36, 41 (1st Cir. 1981). The legislation, which was "offered in the 'nature of a compact' to 'the people of Puerto Rico,' authorized them to draft their own constitution." *Flores de Otero*, 426 U.S. at 593. See also *United States* v. *Lopez Andino*, 831 F.2d 1164, 1168 (1st Cir. 1987), cert. denied, 486 U.S. 1034 (1988). Under the Act, Puerto Rico "elects its Governor and legislature; appoints its judges, all cabinet officials, and lesser officials in the executive branch; sets its own educational policies; determines its own budget; and amends its own civil and criminal code." *Examining Board of Engineers, Architects & Surveyors* v. *Flores de Otero*, 426 U.S. at 594.

In sum, the purpose of the Federal Relations Act "was to accord to Puerto Rico the degree of autonomy and independence normally associated with States of the Union." *Flores de Otero*, 426 U.S. at 594. See also *Rodriguez* v. *Popular Democratic Party*, 457 U.S. 1, 8 (1982) ("Puerto Rico, like a state, is an autonomous political entity."). Accordingly, the First Circuit has held that "Puerto Rico is to be treated as a state for purposes of the double jeopardy clause." *United States* v. *Lopez Andino*, 831 F.2d at 1167-1168; accord *United States* v. *Bonilla Romero*, 836 F.2d at 42 n.2; *United States* v. *Benmuhar*, 658 F.2d 14 (1st Cir. 1981); see also *United States* v. *Morales-Diaz*, 925 F.2d 535, 540 (1st Cir. 1991); *United States* v. *Quinones*, 758 F.2d 40 (1st Cir. 1985).

This case is not an appropriate vehicle to address the conflict between the Eleventh and the First Circuits. The Eleventh Circuit's decision against petitioners was, of course, not based on its conclusion regarding the dual sovereignty issue, since the Eleventh Circuit agreed with petitioners on that issue. The dual sovereignty issue would be relevant here only as an additional ground for upholding the judgment below. The First Circuit, which holds that Puerto Rico and the United States are separate sovereigns for double jeopardy purposes, would have reached the same result as the Eleventh Circuit in this case by finding no double jeopardy issue to be presented at all. Accordingly, this case does not squarely present the question whether the dual sovereignty doctrine applies to successive prosecutions by Puerto Rico and the United States.

The same conclusion follows from an examination of petitioners' collateral estoppel claim. If the First Circuit were correct that the United States and Puerto Rico are separate sovereigns for double jeopardy purposes, it would follow that (at least absent extraordinary circumstances in which one sovereign is acting as a "sham and a cover" for the other, cf. *Bartkus* v. *Illinois*, 359 U.S. 121, 123-124 (1959)) an offense committed against the United States would never be "the same offense" as an offense committed against Puerto Rico. It would also follow that the United States and Puerto Rico are not "in privity" for purposes of application of the collateral estoppel doctrine.

Even parties who derive their power from the same sovereign, however, may not be "in privity" for collateral estoppel purposes. See *United States* v.

Bonilla Romero, 836 F.2d at 43 ("[T]he source of authority of two government entities is not dispositive of whether they are in privity."); *Davis* v. *Eide*, 439 F.2d 1077, 1078 (9th Cir.), cert. denied, 404 U.S. 843 (1971). Cf. *United States* v. *Payne*, 2 F.3d 706 (6th Cir. 1993) (determination by administrative law judge that Postal Service failed to prove its allegations of wrongdoing by defendant did not collaterally estop subsequent criminal prosection). Thus, even if the dual sovereignty doctrine is inapplicable, that does not dispose of the question whether prosecuting authorities of the United States and Puerto Rico are "in privity" for collateral estoppel purposes. There does not appear to be any conflict in the circuits on the "privity" issue. Further review in this case is therefore unwarranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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